IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Case No. 79-693

CONSUMER CREDIT INSURANCE AGENCY, INC., *et al.*,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Consumer Credit Insurance Agency, Inc.; Consumer Fidelity Insurance Agency, Inc.; Consumer Credit Insurance Agency, Inc., d.b.a. Lee Hoffman and Associates; Thomas A. Mills and Associates, Inc.; and American International Assurance Co., Ltd., petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case. That judgment affirmed the judgment and order of the United States District Court for the Northern District of Ohio, Eastern Division, overruling petitioners' motion, brought under Federal Rule of Criminal Procedure 41, for return of property seized by federal agents on September 10, 1976.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit, reported at 599 F.2d 770 (6th Cir. 1979), is set forth in the Appendix, *infra,* pp. 2a-21a. The unreported opinion of the District Court is set forth in the Appendix, *infra,* pp. 22a-33a.

Jurisdiction

The opinion of the Court of Appeals was filed on June 13, 1979. Appendix, *infra,* p. 2a. The Court of Appeals denied the petitioners' motion for rehearing on August 8, 1979. Appendix, *infra,* p. 1a.

This petition seeks review of the judgment of a United States Court of Appeals in a civil case. This Court has jurisdiction to grant this petition under 28 U.S.C. § 1254(1).

Questions Presented For Review

1. Is the Fourth Amendment violated when, in order to bypass that provision's probable cause requirement, the government issues forthwith grand jury subpoenas *duces tecum* and employs as many as five F.B.I. agents and one Special Attorney of the Department of Justice to coerce immediate compliance with the commands of the subpoenas in order to obtain all of the books and records of five insurance companies, the petitioners herein, covering a thirty-three month period?

2. Is the rule of *Bumper v. North Carolina,* 391 U.S. 543 (1968), that a search and seizure under the claimed authority of a warrant may not be justified on the basis of consent applicable when the seizure is accomplished

under the claimed authority of forthwith grand jury subpoenas *duces tecum*?

3. Did the courts below correctly apply the totality of the circumstances test for consent to a search and seizure enunciated in *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), in concluding that the petitioners had voluntarily consented to the seizure of their business records?

4. Are forthwith grand jury subpoenas *duces tecum* which command the production of all of the books and records of five insurance companies, the petitioners herein, for a thirty-three month period ending just prior to the date of service unreasonable, overbroad and violative of the Fourth Amendment?

5. Where the petitioners knew the identity of the person upon whose information the federal agents relied to obtain a search warrant for a firearm and to issue *forthwith* subpoenas but were unable to subpoena her because she was a participant in the government's witness protection program, did the district court err in overruling the petitioners' motion to require that she be produced to testify on matters central to the issues being contested?

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal Rule of Criminal Procedure 41(e) (pertinent portion):

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. . . ."

Statement of the Case

A. Procedural History

On September 16, 1976, the petitioners filed a motion in the United States District Court for the Northern District of Ohio, pursuant to Federal Rule of Criminal Procedure 41(e), solely for the return of a huge quantity of business documents which, they asserted, had been unlawfully seized six days earlier by federal agents acting under color of three "forthwith" grand jury subpoenas *duces tecum* and a search warrant. A hearing on the petitioners' motion began on September 23, 1976 and on October 5, 1976 the district court entered an order overruling the motion for return on the ground that the petitioners had consented to the seizure. Recognizing that the petitioners' businesses would be substantially impeded without the subpoenaed documents, however, the district court ordered the government to return the originals to the petitioners after the government had an opportunity to make copies of the records. In an effort to secure return of the copies made by the government of their records, the petitioners appealed the district court's order overruling their motion for return of property to the United States Court of Appeals for the Sixth Circuit.

That court, by a vote of 2-1, affirmed the district court's decision, even though the majority stated that it did not condone the procedure employed by the government to obtain the petitioners' records.[1] Judge Weick wrote a blistering dissent in which he concluded that the method utilized by the government to secure the records was "an unlawful practice" which "should be stopped in its tracks by the Court." Appendix, *infra,* at 21a.

Although the government has had copies of the petitioners' business records for well over three years now, no criminal proceeding has to this date ever been instituted against anyone as a result of the government's investigation in this matter.

B. Facts[2]

Shortly before 9:30 a.m. on the morning of September 10, 1976, Special F.B.I. Agent Terry Lyons, along with two other F.B.I. agents, arrived by automobile at 514 Prospect Avenue in Cleveland, Ohio. They parked in front of the building at that location and waited there in anticipation of gaining entrance to the fifth-floor offices occupied by the five insurance companies who are the petitioners here. (Tr. 10, 32, 27, 133, 134.)

The building occupied by the petitioners was equipped with a locked security system. In order to reach the fifth floor, it was necessary to place a call to someone on that

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[1] *See* Appendix, *infra* at 9a.

[2] Since, as to those factual issues upon which there was conflicting testimony, the district court elected "to assign greater credibility and weight to the Government's witnesses than to plaintiffs'" (*See* Appendix, *infra* at 31a), the recitation of facts set forth herein is based primarily upon the direct and cross-examination of the government's witnesses.

floor from a telephone located between the inner and outer doors located at the main entrance to the building. The inner front door of the building would be opened automatically from the fifth floor, and an elevator would be sent down to the first floor to pick up the caller. (Tr. 12-13).

At approximately 9:40 a.m., Allan Wachs, one of the custodians of petitioners' records upon whom a subpoena was to be served, arrived in front of the building and was immediately approached by Lyons and the other two F.B.I. agents. Lyons informed Wachs that they were there on official business. (Tr. 38). Wachs, accordingly, escorted them to the fifth-floor offices of the petitioners so that they could talk indoors rather than outside on the sidewalk. (Tr. 37-38).

Upon reaching the fifth floor, the agents and Wachs proceeded to Wachs' office where Wachs was served with the first of three "forthwith" grand jury subpoenas *duces tecum* which the agents intended to serve that morning. (Tr. 13, 15). Each of the three subpoenas, which were substantively identical, was addressed to a custodian of petitioners' business records, and commanded him to appear forthwith before the grand jury and to bring with him *all* of the business records, without limitation, accumulated between January 1, 1974 and September 9, 1976 (the day prior to the date upon which service was effected) by the five insurance companies who are the petitioners here. The three subpoenas were directed to Allan M. Wachs, Thomas Bosse and Gennaro Orrico, respectively, as custodians of records.[3]

[3] The subpoenas commanded the immediate production of the following documents:

"all books and records of Consumer Credit Insurance Agency, Inc., Consumer Fidelity Insurance Agency, Inc., Lee Hoffman and Associates, Thomas A. Mills and Associates, Inc., and American International Assurance Co., Ltd. for the period from January 1, 1974 to September 9, 1976 said records to include, but not be limited to, corporate minute book(s), correspondence, memoranda, books of account including all journals and ledgers, bank statements, cancelled checks, check stubs, savings account books, records of all insurance policies written, computer printouts, all agreements, contracts, treaties, or understandings with any insurance companies and any agreements, contracts, treaties or understandings with any automobile, trailer, boat, or mobile home dealers."

Immediately after Wachs read the subpoena that had been served upon him, Agent Lyons presented him with a search warrant which authorized a search for and seizure of a firearm allegedly located in "[t]he top right hand desk drawer" of the desk used by Gennaro Orrico. At about this time, Thomas Bosse arrived on the premises and, upon his arrival, he too was served with a forthwith subpoena. (Tr. 15-11). Agent Lyons told Bosse, as he had also told Wachs, that the subpoenas required them to produce the business records "right away." (Tr. 49).

After examining the subpoena and the search warrant, which was shown to him, Bosse stated that he wanted to telephone his attorney. (Tr. 17). Bosse then left the room and went to his office to make that call. (Tr. 17). One of the F.B.I. agents followed Bosse and positioned himself in the doorway of Bosse's office. (Tr. 42).

In the meantime, the other federal agents, accompanied by Wachs, went to Orrico's office to execute the search warrant. (Tr. 17). It turned out that the "firearm" identified in the search warrant was not a firearm at all but was, in fact, a toy pistol used as a paperweight. (Tr. 184).[4]

[4] The affidavit for the search warrant, which was signed by Agent Lyons, was based upon five or six conversations Lyons had had with an "informant" during a 15-day period. (Tr. 54).

(footnote continued on following page)

At this point, the federal agents apparently had completed any lawful business they may have had to transact at the offices of the petitioners. They had executed the search warrant and served the two subpoenas which could be served that morning.[5] Nevertheless, the three federal agents remained on the premises. (Tr. 18, 60-61). Indeed, they not only remained on the premises, but in fact, they placed a telephone call to request that Special United States Attorney Ken Bravo come to the scene. (Tr. 18). A short time later, Bravo arrived at the petitioners' premises along with two other F.B.I. agents (Tr. 18). At that point, a total of five F.B.I. agents and a Special U.S. Attorney occupied the premises at which the petitioners' insurance offices were located.

The testimony of Agent Lyons, who was in charge of the investigation, revealed much about the plan formulated by the government to obtain all of the petitioners' business records that day. He admitted that the F.B.I agents and Special Attorney Bravo had considered seeking a search warrant to obtain the records. (Tr. 57-58). They rejected that possibility, however, because they knew that they lacked probable cause for the issuance of a warrant:

> "Q. And my question is, that your reason would be that you did not go after a search warrant was that you did not have probable cause to go before a magistrate?
>
> A. That is the reason" (Tr. 58).

Lyons had no independent information about the informant, who had never supplied information for any prior investigation. (Tr. 54).

[5] Gennaro Orrico, the third person to be subpoenaed, was not on the premises at that time.

In order to bypass the probable cause requirement, the federal agents and the Special U.S. Attorney decided that they would issue a grand jury subpoena for the records:

> "Q. So you determined to bypass that requirement by issuing a Grand Jury subpoena instead, is that not correct?
>
> A. I did not make that decision.
>
> Q. But you participated in the discussions in which that determination was made?
>
> A. Yes.
>
> Q. And that was the reason, was it not?
>
> A. Yes." (Tr. 58-59).

Even more importantly, they decided to make the grand jury subpoenas returnable *forthwith* for the express purpose of bypassing the probable cause requirement of the Fourth Amendment:

> "Q. That is why the Grand Jury subpoena was a forthwith subpoena, was it not?
>
> A. I would say, yes." (Tr. 59).[6]

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[6] On direct examination, Agent Lyons had stated that the reason for the "forthwith" command of the subpoenas was that he had received information which led him to believe that a possibility existed that the records would, otherwise, not reach the grand jury. (Tr. 31). On cross-examination, it was established that the source of this information was the same informant mentioned in the search warrant affidavit. (Tr. 56). The informant was a former employee of the petitioners and, because they were aware of her identity, the petitioners attempted to subpoena her to testify. (Tr. 200-201). However, she was under the Witness Protection Program of the U.S. Marshal Service, and, thus, could not be found. (Tr. 223). The peti-

Moreover, under the plan formulated by the federal agents, it was their intention not merely to serve the subpoenas but to gain entrance to the petitioners' premises even if force was required. And they arrived at petitioners' premises prepared to obtain the records, not merely to effect service of the subpoenas. Agent Lyons testified as follows:

> "Q. So that, armed with the subpoenas duces tecum and the search warrant it was your clear intention that whether you met resistance or not, to gain entry to the premises on that morning, is that not the case?
>
> A. Yes.
>
> Q. Have you ever had occasion to serve subpoenas before?
>
> A. Many times.
>
> Q. How many F.B.I. Agents are necessary, in your opinion, to serve a subpoena?
>
> A. That would depend on the amount of records involved, whether they are going to be turned over immediately, or whether they are

tioners, therefore, moved that the informant be produced so that they could demonstrate the falsity of the search warrant affidavit and the government's claim that a danger existed that the petitioners' business records would be destroyed, evidence which would certainly impeach the credibility of the government's primary witness, Agent Lyons. (Tr. 225-227). The district court overruled the motion to produce the witness, apparently on the ground that her testimony would be irrelevant. (Tr. 228). Ironically, the district court's order overruling petitioners' motion for return was based, in part, upon the court's determination to assign greater credibility and weight to the government's witnesses than to the petitioners'.

not. A lot of factors are taken into consideration.

Q. Let me back up. I'm talking about taking service of a subpoena, not the execution of a warrant, are we clear?

A. Yes.

Q. It takes two or three to make service on a document?

A. There again it would, you would have to determine what records are going to be taken.

Q. I'm not talking about obtaining them, sir, I'm talking about service of a subpoena duces tecum only.

> The Court: He has answered. Let's not be repetitious.
>
> Mr. Berkman: I'm sorry." (Tr. 40-41).

As already noted, after Thomas Bosse was served with his forthwith subpoena, he stated that he wanted to telephone an attorney. He attempted to contact Robert Jackson, the attorney for petitioner Consumer Credit Insurance Agency, Inc. (Tr. 73, 115). Unable to reach Jackson, Bosse talked to Steve Kalette, a young attorney employed at Jackson's law firm. (Tr. 73, 115). Shortly thereafter, Kalette, at the direction of Jackson, went to the premises and spoke with Bosse and Wachs. (Tr. 19).[7]

[7] At about this time, Agent Lyons informed two of the F.B.I. agents that they were no longer needed and could leave. (Tr. 19). Special Attorney Bravo and three F.B.I. Agents remained on the premises, however, for the rest of the day.

Kalette remained on the premises for the balance of the day. (Tr. 125).[8]

Robert Jackson did not arrive until sometime between 10:30 and 10:45 a.m., approximately one hour after the subpoenas had been served. (Tr. 74). Upon his arrival, he had conversations with both Bravo and Bosse. (Tr. 163). Jackson had never had any experience with a forthwith subpoena before and was generally unfamiliar with the legal ramifications of what was occurring. (Tr. 164). Nevertheless, he outlined to Bosse, as best he could, the three options he believed were available: (1) Bosse could physically resist the commands of the subpoenas, a course of action which would probably result in Bosse's immediate arrest and a contempt of court citation; (2) Bosse could voluntarily comply with the subpoenas, turn over the documents and forget the matter; or (3) Bosse could acquiesce to the legal commands of the subpoenas and begin the process of turning over the documents while Jackson returned to his office and attempted to prepare and file a motion to quash the subpoenas before the documents had already been released and it was too late. (Tr. 163-167).

At no time during the course of the day's events did any federal agent, Special Attorney Bravo or attorney Jackson advise Bosse that he had a right to test the validity of the subpoenas *before* either complying with them or subjecting himself to arrest and a contempt citation. (Tr. 105). Bosse, therefore, decided to acquiesce to the commands of the subpoenas while Jackson returned to his office to prepare a motion to quash. (Tr. 166-167).

[8] Bosse testified that Kalette was not asked for legal advice but acted solely on the instructions of Jackson. (Tr. 124-125).

Bosse's instructions to Jackson were to proceed as soon as Jackson could. (Tr. 167).[9]

This decision was reached at 11:15 a.m. and, according to the testimony of Agent Lyons, Bosse and Jackson asked the federal agents and Special Attorney Bravo to remain on the premises in order to assist in the collection of the records. (Tr. 22). Thus, accepting the testimony of Agent Lyons, federal agents had occupied the petitioners' offices for an hour and a half after executing the warrant and serving the subpoenas before anyone "invited" them to stay.

For the next few hours, Bosse, Wachs and the federal agents collected the documents identified in the subpoenas. At approximately 2:40 p.m., Gennaro Orrico arrived on the scene and was immediately served by Agent Lyons with the forthwith subpoena *duces tecum* addressed to him. Special Attorney Bravo testified that Orrico emphatically refused to comply with the subpoena and that Orrico stated "if you want me to go you're going to have to take me in handcuffs." (Tr. 236). Bravo testified that he told Orrico that the federal agents expected Orrico to comply with the subpoena and that, if he did not, Bravo would seek a warrant for Orrico's arrest. (Tr. 236).

Bravo, according to his own testimony, then told Bosse the same thing—that they expected Orrico to comply with the subpoena and that his failure to do so would result in

[9] Jackson, who left the premises at 11:30 a.m., was unable to return to his office until 2 o'clock in the afternoon, at which time he began to research the law and to work on a motion to quash. Before he could complete his research and drafting, however, he received a telephone call from Bosse at 3:15 p.m. informing him that the federal agents had already left with the records (Tr. 170-171). Thus, Jackson concluded, it was too late to move to quash the subpoenas. (Tr. 171).

Bravo's seeking a warrant for Orrico's arrest. (Tr. 237-238). Bravo also, according to his own testimony, warned Bosse that the issuance of a warrant for Orrico's arrest might well result in newspaper publicity that would have an adverse effect on Bosse's and Orrico's insurance business. (Tr. 238). In view of what Bravo had told him, Bosse calmed Orrico sufficiently to avoid a confrontation. (Tr. 132).

Shortly thereafter, an F.B.I. van arrived at the petitioners' building to transport the records to the grand jury. (Tr. 25-26). The records, which filled a four-drawer metal filing cabinet and three cardboard boxes were taken at about 3:20 p.m. from the premises and delivered to the grand jury by federal agents. (Tr. 25, 28, 133).[10]

Six days later the petitioners filed their motion for return of property in the United States District Court for the Northern District of Ohio, claiming that their business records had been unlawfully seized by the federal agents. After hearing, the district court overruled the motion for return on the ground that the petitioners had consented to the seizure. That decision was affirmed by a divided Court of Appeals for the Sixth Circuit. The petitioners now ask this Court to review the decisions below.

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[10] Bosse testified that the daily operation of the petitioners' insurance business was impossible without the records. (Tr. 134).

Reasons For Granting the Writ

I

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE FOURTH AMENDMENT IS VIOLATED WHEN, IN ORDER TO BYPASS THAT PROVISION'S PROBABLE CAUSE REQUIREMENT, THE GOVERNMENT ISSUES FORTHWITH GRAND JURY SUBPOENAS *DUCES TECUM* AND EMPLOYS AS MANY AS FIVE F.B.I. AGENTS AND ONE SPECIAL ATTORNEY OF THE DEPARTMENT OF JUSTICE TO COERCE IMMEDIATE COMPLIANCE WITH THE COMMANDS OF THE SUBPOENAS IN ORDER TO OBTAIN ALL OF THE BOOKS AND RECORDS OF THE PETITIONERS' FIVE INSURANCE COMPANIES COVERING A THIRTY-THREE MONTH PERIOD.

The decision of the Court of Appeals in this case raises important and far-reaching questions concerning the effectiveness of the Fourth Amendment to thwart carefully conceived and executed schemes created by federal agents to sidestep that Amendment's guarantees. The decision of the Sixth Circuit represents a disturbing invitation to federal agents and prosecutors to abuse the power of the grand jury by issuing, in its name, and coercing immediate compliance with, broad forthwith subpoenas *duces tecum* employed as substitutes for search warrants.[11]

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[11] The majority below expressed reservations about its jurisdiction in this case because the district court ordered the originals of petitioners' records returned and the petitioners were, therefore, seeking return of the copies of their records made by the government. However, the court clearly had jurisdiction. The petitioners' motion has always been solely for the return of property and no indictment or other criminal charge has ever been brought as a result of the government's investigation in this matter. Jurisdiction plainly lies under this Court's decision in *DiBella v. United States,* 369 U.S. 121 (1962). The rule is no different merely because the petitioners seek return of the copies made of their records by the govern-

The record in this case makes it abundantly clear that the single-minded goal of the federal agents who occupied the petitioners' premises for several hours on September 10, 1976 was to obtain thousands of business records maintained by the petitioners. They were not there merely to effect service of subpoenas.

Indeed, the purpose of their mission was clear from the outset, when a total of *three* F.B.I. agents appeared outside the petitioners' building for the purpose of serving three subpoenas and executing a search warrant which authorized the search of a single desk drawer and the seizure of a single object. Obviously Agent Lyons did not need the assistance of two additional F.B.I. agents to search a single desk drawer and to seize a single object. Nor did he need their help to serve three subpoenas. All of that could have been accomplished in five minutes by Agent Lyons alone. The only purpose served by the appearance at the petitioners' premises of three agents of the F.B.I. was to secure the thousands of records identified in the subpoenas and to intimidate the petitioners' custodians by their number and by their claim of lawful authority. Indeed, Agent Lyons admitted as much when, in response to a question as to how may agents are needed to serve a subpoena, he responded, "there again it would, you would have to determine what records *are going to be taken*". (Tr. 41) (Emphasis added).

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ment. The property of the petitioners seized by the government did not consist merely of the actual pieces of paper taken; the *valuable* property seized was the information recorded on the paper and the government still has that property. While there are decisions to the contrary, several courts have held that copies of seized documents are appropriate subjects of motions for return of property. *See Goodman v. United States,* 369 F.2d 166 (9th Cir. 1966); *Vonderale v. Howland,* 508 F.2d 364 (9th Cir. 1975); *Richey v. Smith,* 515 F.2d 1239 (5th Cir. 1975).

The purpose served by obtaining the search warrant for the "firearm" was apparent, as well. The petitioners' offices were located on the fifth floor of a building and, in order to reach those offices, it was necessary to proceed through a security system. In order to carry out their plan to obtain the petitioners' records, it was essential for the federal agents to gain access to the petitioners' offices. Once on the petitioners' premises, the agents could then apply whatever pressure and coercion was necessary to cause the petitioners to part with their business records. Armed with the warrant for the "firearm", the agents were assured of gaining access to the petitioners' offices, whether the agents met resistance or not. Indeed, Agent Lyons admitted that they intended to invade the petitioners' premises on the morning of September 10, 1976 regardless of the resistance they may have encountered. (Tr. 40).

The conduct of the federal agents after gaining entrance to the petitioners' offices also amply demonstrated their intention to employ the *forthwith* subpoenas as substitutes for a search warrant. Within minutes after their entry into petitioners' offices, Agent Lyons had executed the search warrant and had served the only two subpoenas which could be served. At that point, the three F.B.I. agents had completed any lawful business they may have had to transact. They had no right to remain on the premises and should have left immediately. Instead, they emphatically warned the petitioners' custodians that "forthwith" meant immediately and they remained to coerce compliance with the subpoenas.

Indeed, in order to apply greater pressure on the petitioners, Agent Lyons telephoned to request that Special Attorney Bravo appear at petitioners' premises. A short

time later, Bravo arrived with two more F.B.I. agents. They had no right whatsoever to enter or remain on the petitioners' premises. Certainly Bravo, a Special Attorney, knew that there was no authority whatsoever for their entrance onto the premises and that they had no lawful purpose for remaining on the premises, whether they were asked to leave or not.[12] The only conceivable purpose for their presence was to exert whatever pressure they could to coerce compliance with the "forthwith" subpoenas and, thereby, obtain the records.

This is further demonstrated by Bravo's reaction to the resistance he met when Orrico appeared on the scene and was served with his "forthwith" subpoena. When Orrico refused to comply with the subpoena, Bravo told him that the federal agents expected him to turn over the records and threatened him with arrest if he failed to do so. Bravo told Bosse the same thing and further warned Bosse that adverse newspaper publicity would result in the event Orrico was arrested.

Furthermore, Agent Lyons admitted that the forthwith subpoenas were used as substitutes for a search warrant. He admitted that they had considered seeking a search warrant to obtain the records, but had rejected that idea because they knew that they lacked probable cause. (Tr. 58). Lyons stated that they decided to use the power of the grand jury, by issuing subpoenas, for the specific purpose of "bypassing" the probable cause requirement of the Fourth Amendment. (Tr. 59). And, most importantly, that was the reason that they decided to make the subpoenas returnable "forthwith"—in order to bypass the probable cause requirement of the Fourth Amendment. (Tr. 59).

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[12] Even accepting the testimony of Agent Lyons it was not until 11:15 a.m., long after the arrival of Bravo, that anyone asked the federal agents to stay. (Tr. 22).

Thus, by issuing grand jury subpoenas for the records, by making the subpoenas returnable forthwith, by securing a narrow warrant for a "firearm" to insure that they could gain entrance to petitioners' offices and by employing numerous agents to coerce immediate compliance with the subpoenas, the federal agents were able to accomplish indirectly that which they could not accomplish directly—seizure of the petitioners' business records without a warrant and without probable cause. *See Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920); *Gouled v. United States,* 255 U.S. 298 (1921); *Mancusi v. De Forte,* 392 U.S. 364 (1968). And both courts below countenanced this end-run around the Fourth Amendment.

By way of contrast, the United States District Court for the Southern District of New York condemned a similar episode as an unlawful seizure in *In re Nwamu,* 421 F. Supp. 1361 (S.D.N.Y. 1976). In that case, federal agents appeared at the movant's offices on two consecutive days armed with "forthwith" grand jury subpoenas *duces tecum.* On the first day, the subpoena was addressed to one of the movant's corporate officers and required the production of certain files and other documents. The agent who served the subpoenas informed movant's officer that the records had to be produced immediately and a failure to do so would result in a contempt of court citation. The agent told movant's officer that he would take the documents in lieu of the officer's appearance before the grand jury and the officer surrendered the documents. The next morning, three other agents appeared at movant's offices under color of three grand jury subpoenas, two of which were returnable "forthwith" and commanded the production of a file and certain typewriter balls. These items were surrendered to

the agents. Subsequently, a motion for return of property and to quash the subpoenas was filed and granted. The court analyzed the use by federal agents of the forthwith subpoenas as follows:

> "The subpoena was not a warrant. It gave the agents no authority to arrest or otherwise compel the movants' employees either to accompany them to the offices of the FBI or to the grand jury. Nor did it authorize the agents to seize subpoenaed items, nor to get and take the items with them if the employees chose to 'ride the subway'. Such courses of action required a warrant, issued by an objective magistrate, based on a showing of probable cause. Lacking either type of warrant, the agents derived no authority from the 'forthwith' subpoena to 'execute' the subpoena by demanding that the employees either accompany them to the grand jury immediately or hand over the subpoenaed items unless they did." *Id.*, at 421 F. Supp. 1365.

The decision of the court below presents an important issue as to whether the warrant requirements of the Fourth Amendment can be avoided by the use and enforcement of forthwith grand jury subpoenas *duces tecum* to obtain thousands of business records. As Judge Weick aptly put it in his dissent below:

> "The majority opinion permits the FBI to effect an unlawful search and seizure of all the books and records of the plaintiff corporations for a period covering the thirty-three months immediately preceding the seizure, by using as many as five FBI Agents and one Special Attorney of the Department of Justice to coerce immediate compliance with overbroad, unlawful forthwith grand jury subpoenas duces tecum. It constituted a gross abuse of the Grand Jury process." *See* Appendix, *infra* at p. 10a.

The petitioners respectfully urge the Court to grant the writ of certiorari in order to consider this important issue.

II

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE RULE OF *BUMPER v. NORTH CAROLINA*, 391 U.S. 543 (1968), THAT A SEARCH AND SEIZURE UNDER THE CLAIMED AUTHORITY OF A WARRANT MAY NOT BE JUSTIFIED ON THE BASIS OF CONSENT, IS APPLICABLE WHEN THE SEIZURE IS ACCOMPLISHED UNDER THE CLAIMED AUTHORITY OF FORTHWITH GRAND JURY SUBPOENAS *DUCES TECUM*.

Both the district court and the court of appeals rejected the petitioners' claim of unlawful seizure in this case on the ground that petitioners' custodians had voluntarily consented to the delivery of all of their records to the government. In both courts, the petitioners argued, *inter alia*, that the question of consent in this case was controlled by this Court's decision in *Bumper v. North Carolina*, 391 U.S. 543 (1968), which, the petitioners argued, compelled a finding that the petitioners' acquiescence to the claimed authority of the forthwith subpoenas did not constitute consent. This argument was rejected, however. Petitioners submit that an important question is presented by the refusal of the courts below to apply the rationale of *Bumper* to the present case.

In *Bumper*, this Court carefully stated the issue as follows: "whether a search can be justified as lawful on

the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant." *Id.*, at 391 U.S. 548 (footnote omitted). This Court held that "there can be no consent under such circumstances." *Id.*, at 391 U.S. 548-550. The Court reasoned as follows:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.
>
> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." (footnotes omitted).

In the present case, three federal agents entered the petitioners' offices under color of legal process in the form of a warrant for a "firearm" and three forthwith subpoenas commanding the immediate production of thousands of business records. The agents, who by their own admission issued the subpoenas as substitutes for a

search warrant, emphatically stated to petitioners' custodians that those legal documents required the immediate production of the petitioners' business records. The agents, joined by a Special United States Attorney, remained on the premises to enforce compliance with the forthwith command of the subpoenas and, when they met resistance, threatened the petitioners' custodians with arrest and adverse media publicity. "The situation [was] instinct with coercion . . . And '[w]here there is coercion, there cannot be consent.'" *Id. See also, Johnson v. United States,* 333 U.S. 10 (1948); *Amos v. United States,* 255 U.S. 313 (1921).

In *Bumper,* of course, the police officers claimed the authority of a warrant to conduct a search. In the present case, federal agents acted under the claimed authority of forthwith subpoenas. The district court found this factual distinction sufficient to render the principles announced in *Bumper* inapplicable to the case at bar on the ground that ". . . the coercion inherent in a search warrant is far greater than that existent in a subpoena duces tecum." *See* Appendix, *infra* at 33a.

The district court's analysis ignored the crucial fact that the subpoenas employed in this case were by no means ordinary grand jury subpoenas *duces tecum.* Ordinarily, a subpoena *duces tecum* is served by a United States marshal, who delivers the document in the same manner as other legal process and then departs. It usually is returnable at some later date which gives the party subpoenaed ample time to make an informed and uncoerced decision as to whether to comply voluntarily with the subpoena or to seek the intervention of a court to protect any rights which may be infringed by the subpoena's command. *See United States v. Dionisio,* 410 U.S. 1, 10 (1973).

By way of contrast, the subpoenas employed in the present case were returnable "forthwith". They were served by three agents of the F.B.I., who were also armed with a search warrant and who warned the petitioners' custodians that the subpoenas required them to produce thousands of documents immediately. And compliance with the subpoenas was coerced by as many as five F.B.I. agents and a Special U.S. Attorney, who threatened the petitioners' custodians with arrest and adverse publicity if they failed to comply with the subpoenas. In short, the effect of the forthwith subpoenas in this case was no less coercive than was the effect of the search warrant for the "firearm." In each case, the petitioners acquiesced to the claim of lawful authority. The courts below should, therefore, have applied this Court's decision in *Bumper* to conclude that the seizure of petitioners' records in reliance upon the forthwith subpoenas could not be justified on the basis of consent.

The district court, however, found further support for its conclusion that the rule announced in *Bumper* was inapplicable to this case in this Court's decision in *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). In that case, the Court held that a prosecutor, in order to satisfy his burden of proving that consent to a search was voluntary and freely given, need not necessarily establish that the subject of the search knew he had a right to withhold consent. While the subject's knowledge of his right to refuse is one factor to be considered, the Court held that "voluntariness is a question of fact to be determined from all the circumstances." *Id.,* at 412 U.S. 249. The district court concluded that *Schneckloth* reflected this Court's disfavor with any *per se* rule regarding consent, such as the rule announced in *Bumper,* applicable to a particular class of cases. Thus, the district court refused to apply

the rule announced in *Bumper* to the seizure which occurred in this case, and, instead, applied the totality of the circumstances test announced in *Schneckloth.* The court of appeals did the same, without even addressing the petitioners' argument, pressed in that court as well, that this Court's holding in *Bumper* controlled the issue of consent in this case.

Moreover, the lower courts not only declined to apply the rule announced in *Bumper* to the facts of this case, but, in applying a totality of the circumstances test, they gave little or no weight to the fact that the petitioners "consented" to the seizure of their business records only after the federal agents asserted a right to immediate possession of the records under the authority of the forthwith subpoenas. Thus, the lower courts apparently not only concluded that *Bumper* was inapplicable to this case, but that its precedential value, in any event, had been substantially eroded by this Court's decision in *Schneckloth.*

Thus, an issue of great importance is presented for review by this Court—whether the rule announced in *Bumper* has continued validity in the wake of *Schneckloth.* The petitioners submit that the rule announced in *Bumper* remains viable and applicable to that class of cases where the "consent" to a search or seizure has been given only after an assertion by the government that it is armed with legal process which entitles the government to effect the seizure. Indeed, in *Schneckloth,* the Court specifically reviewed the *Bumper* rule and affirmed its continuing validity. *Schneckloth, supra,* at 412 U.S. 233-234. Nevertheless, the decisions of the courts below reflect a view that *Schneckloth* has eroded the principles announced in *Bumper.*

This Court, therefore, should grant the writ of certiorari in this case in order to consider this important question concerning the continued validity of *Bumper* and to consider whether the rule announced in *Bumper* is applicable when the seizure is accomplished, not under the claimed authority of a warrant, but under the claimed authority of forthwith subpoenas employed as substitutes for a warrant.

III

THIS CASE PRESENTS THE COURT WITH AN IMPORTANT OPPORTUNITY TO GIVE MEANINGFUL GUIDANCE TO THE LOWER COURTS OF THE NATION CONCERNING THE KIND OF ANALYSIS REQUIRED AND THE WEIGHT TO BE GIVEN VARIOUS FACTORS IN THE APPLICATION OF THE TOTALITY OF THE CIRCUMSTANCES TEST FOR CONSENT TO A SEARCH AND SEIZURE ENUNCIATED BY THIS COURT SIX YEARS AGO IN *SCHNECKLOTH v. BUSTAMONTE*, 412 U.S. 218 (1973).

In addition to their argument that this Court's decision in *Bumper* was controlling as a matter of law on the issue of consent in this case, the petitioners also argued in the lower courts that, under the totality of the circumstances approach of *Schneckloth v. Bustamonte, supra,* the conclusion was inescapable that the government had failed to meet its burden of proving that petitioners' "consent" to the seizure of their records was freely and voluntarily given and was uncontaminated by any duress or coercion. *See also Amos v. United States,* 255 U.S. 313 (1921); *United States v. Hearn,* 496 F. 2d 236 (6th Cir., 1974), *cert. denied,* 419 U.S. 1048 (1974). The district court concluded otherwise, however, and the majority in the court of appeals refused to find that the district court's determination was clearly erroneous.

Both the district court and the majority in the court of appeals relied very heavily upon two factors in concluding that the government had satisfied its burden of proving the voluntariness of the petitioners' consent. In particular, both courts placed great emphasis upon the fact that the petitioners' custodians had an opportunity to consult with counsel and upon the fact, found by the district court, that the petitioners' custodians requested the federal agents to remain on the premises in order to assist in the collection of the documents.

However, as Judge Weick in his dissenting opinion persuasively demonstrated, the presence of counsel in this case hardly dissipated the effect of the coercive atmosphere generated by the presence at petitioners' premises of as many as six federal agents, because counsel expressed ignorance of the legal ramifications of what was occurring and never advised petitioners' custodians that they had a right to test the validity of the subpoenas *before* either complying with the subpoenas or subjecting themselves to arrest and a contempt citation. As to the "invitation" extended by petitioners' custodians to the federal agents to remain on the premises, Judge Weick demonstrated that federal agents had occupied the petitioners' premises for more than an hour before anyone "requested" them to remain, even accepting the testimony of the government's witnesses.

The majority in the court of appeals also emphasized the determination made by the district court to assign greater credibility and weight to the government's witnesses than to petitioners'. But as Judge Weick noted, both the district court and the majority in the court of appeals ignored numerous *uncontroverted* facts in the record which militated against any conclusion that the petitioners had voluntarily consented to the seizure of

their records. Judge Weick was able to list numerous important facts ignored by the majority, even accepting the testimony of government witnesses. As Judge Weick put it:

> "Accordingly, even if one assigns greater weight and credibility to the testimony of the Government's witnesses, the following facts emerge as uncontroverted: First, at least three, and as many as six, Government agents (including Special Attorney Bravo) were present on the plaintiffs' premises for over an hour before any 'request' was made that they stay at all. Second, the FBI agents and Special Attorney Bravo repeatedly emphasized that the forthwith command of the subpoenas mandated immediate compliance. Third, the plaintiffs' custodians were never informed by the Government agents of the right to refuse compliance in order to test the validity of the subpoenas. Fourth, Special Attorney Bravo admittedly threatened plaintiffs' custodians with arrest and with unfavorable publicity. Fifth, the normally beneficial effects of the advice and presence of counsel were reduced in this case because Attorney Jackson expressed ignorance of the plaintiffs' rights under a forthwith subpoena duces tecum, and the plaintiffs did obtain, promptly, other counsel to file their motion for the return of property." Appendix, *infra,* at 16a-17a.

The petitioners would add to the compelling list compiled by Judge Weick the following uncontroverted facts to which the majority in the court of appeals and the district court failed to direct adequate attention:

(1) Although Agent Lyons could have served the subpoenas by himself in a matter of seconds, he was accompanied by two other F.B.I. agents. Lyons testified that the number of agents needed to serve subpoenas depends upon "what records *are going to be taken.*" (Tr. 41) (Emphasis added).

(2) The three F.B.I. agents who appeared at petitioners' premises were also armed with a search warrant for a "firearm". Lyons testified that they intended to gain access to the petitioners' offices, which had a security system, whether they met resistance or not.

(3) After serving the subpoenas and executing the warrant, the federal agents remained on the premises. Indeed, they summoned Special Attorney Bravo and two other agents to the petitioners' premises. It was only a substantial period of time following the arrival of Bravo that anyone asked the agents to remain, even accepting the testimony of the government's witnesses.

(4) Agent Lyons admitted that the federal agents had issued forthwith subpoenas *and* made the subpoenas returnable forthwith for the specific purpose of bypassing the probable cause requirement of the Fourth Amendment.

(5) The "consent" given by the petitioners' custodians to the seizure of their records occurred only after the federal agents had asserted that the forthwith subpoenas required that the petitioners immediately produce their records.

In short, the petitioners submit that the courts below failed to give adequate consideration to *all* of the facts and circumstances surrounding the seizure, as required by *Schneckloth*. The petitioners further submit that the lower courts gave disproportionate emphasis to the factors upon which those courts did rely in their determination that the government had met its burden of proving the voluntariness of the petitioners' consent.

There can be no question but that the issue of consent to a search is one which frequently arises in every trial and appellate court of this nation. It has now been six years since this Court's watershed decision in *Schneckloth*. And while the Court has had a couple of occasions since that time to consider certain aspects of the consent issue,[13] the time is ripe for this Court to give its full attention again to this important question. Because of the recurring nature of the issue, trial and appellate courts are sorely in need of this Court's guidance on the proper application of the totality of the circumstances test announced in *Schneckloth*—the kind of analysis required, the weight to be given various factors, and the deference which appellate courts owe to the findings of fact made by the trial courts. This case, because of its factual setting, as thoroughly developed in the record, presents the Court with a unique opportunity to supply in a meaningful way the kind of guidance needed by the lower courts. The petition for a writ of certiorari should be granted.

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[13] *See United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Watson*, 423 U.S. 411 (1976).

IV

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER FORTHWITH GRAND JURY SUBPOENAS *DUCES TECUM* COMMANDING THE PRODUCTION OF ALL OF THE BOOKS AND RECORDS OF THE PETITIONERS' FIVE INSURANCE COMPANIES FOR A THIRTY-THREE MONTH PERIOD ENDING ON THE DAY IMMEDIATELY PRECEDING THE DATE OF SERVICE ARE UNREASONABLE, OVERBROAD AND VIOLATIVE OF THE FOURTH AMENDMENT.

The petitioners took the position throughout this litigation that an independent basis upon which their motion for return of property should have been granted was that the forthwith grand jury subpoenas *duces tecum* were so all-encompassing and overbroad as to constitute an unreasonable search and seizure under the Fourth Amendment. The petitioners further argued that the fact that the subpoenas were unlawful on their face bolstered their argument that the entire scheme employed by the federal agents to obtain the petitioners' business records was tainted with illegality from the very outset. The petitioners argued that the employment by the federal agents of overbroad and unlawful subpoenas merely verified their contention that federal agents had used the subpoenas to coerce the petitioners to deliver records which the government could not lawfully have obtained either by a search warrant (because, as the government admitted, there was no probable cause for the issuance of a warrant) or by a subpoena reasonable in scope. Neither the district court nor the majority in the court of appeals deemed it necessary to reach the issue raised by the petitioners concerning the legality of the subpoenas, however, because of their determination that the petitioners' "voluntary consent" was sufficient justification for the government's

retention of petitioners' records.[14] Judge Weick, in his dissent in the court of appeals, did reach that issue, however, and concluded that the subpoenas were unreasonable and overbroad and, therefore, unlawful under the Fourth Amendment. The petitioners submit that an important issue, which they have preserved, is presented by this case concerning the validity of the subpoenas under color of which federal agents obtained petitioners' records.

This Court has consistently recognized that a grand jury subpoena *duces tecum* may be so sweeping in its scope that it violates the Fourth Amendment's prohibition against unreasonable searches and seizures. *Hale v. Henkel,* 201 U.S. 43 (1906); *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946); *Brown v. United States,* 276 U.S. 134 (1928); *Boyd v. United States,* 116 U.S. 616 (1886). While there is no fixed formula, a subpoena, to be reasonable under the Fourth Amendment, must be limited in scope to materials relevant to the grand jury's investigation, must designate with reasonable particularity the items to be produced and must focus on

[14] Interestingly enough, the district court quashed a substantively identical subpoena served on a fourth custodian of petitioners' records the same day the three subpoenas at issue here were served. That fourth subpoena was served in Hillsdale, Illinois, on Paul Paczolt. The only difference between the subpoena served on Paczolt and those served in Cleveland was the time for appearance before the grand jury. Paczolt was not directed to appear "forthwith". Rather he was directed to appear on September 21, 1976. During the intervening ten-day period, Paczolt, unlike the parties served in Cleveland, had ample opportunity to test the validity of his subpoena. In the case *In re Grand Jury Subpoena Duces Tecum Addressed to Paul Paczolt,* No. C76-998 (N.D. Ohio 1976), the same court which heard the present case quashed the Paczolt subpoena as unreasonable under the Fourth Amendment.

a reasonable period of time. *See Oklahoma Press Publishing Co. v. Walling, supra; United States v. Gurule,* 437 F. 2d 239, 241 (10th Cir. 1970), *cert. denied sub nom. Baker v. United States,* 403 U.S. 904 (1971); *United States v. Schwimmer,* 232 F. 2d 855 (8th Cir. 1956), *cert. denied,* 352 U.S. 833 (1956).

The subpoenas employed in the present case possessed none of these qualities. Rather, the subpoenas each broadly commanded, without limitation, the immediate production of *all* of the records of the petitioners' five insurance companies covering a thirty-three month period. Furthermore, the subpoenas focused upon the petitioners' most current and active files and records, without which the operation of their businesses was impossible. In particular, the subpoenas commanded the forthwith production of the following documents:

> "all books and records of Consumer Credit Insurance Agency, Inc., Consumer Fidelity Insurance Agency, Inc., Lee Hoffman and Associates, Thomas A. Mills and Associates, Inc., and American International Assurance Co., Ltd. for the period from January 1, 1974 to September 9, 1976 said records to include, but not be limited to, corporate minute book(s), correspondence, memoranda, books of account including all journals and ledgers, bank statements, cancelled checks, check stubs, savings account books, records of all insurance policies written, computer printouts, all agreements, contracts, treaties or understandings with any insurance companies and any agreements, contracts, treaties or understandings with any automobile, trailer, boat, or mobile home dealers."

As Judge Weick stated in his dissenting opinion in the court below:

> "It can be fairly said that the subpoenas required the production of all of the plaintiffs' business records for the period of two years and nine months immediately preceding the date of service of the subpoenas. Moreover, it would be difficult to find a clearer case where the production of documents 'more completely put a stop to the [plaintiffs'] business. . . . ' *Hale v. Henkel, supra,* 201 U.S. at 77."
>
> * * *
>
> "In this case the Grand Jury forthwith subpoenas duces tecum amounted to an illegal search and seizure. They demanded, without any substantial limitation as to the subject matter of the class of document sought, the forthwith production of all of the business records of the plaintiffs for a period of two years and nine months. Because of their sweeping command, and because they focused on the most current records, these subpoenas unreasonably burdened the plaintiffs and interfered impermissibly with the ongoing operation of their business." Appendix, *infra* at 19a-20a, 21a.

An important question is presented in this case concerning the legality, under the Fourth Amendment, of forthwith subpoenas *duces tecum* requiring the production of all of the records of five ongoing insurance companies covering a thirty-three month period ending just prior to the date of service of the subpoenas. The petitioners urge the Court to grant certiorari to consider this important issue.

V

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE PERSON UPON WHOSE INFORMATION THE FEDERAL AGENTS RELIED TO OBTAIN A SEARCH WARRANT AND TO MAKE THE SUBPOENAS RETURNABLE FORTHWITH AND WHOSE IDENTITY WAS KNOWN BY PETITIONERS SHOULD HAVE BEEN PRODUCED TO TESTIFY, AS PETITIONERS REQUESTED.

The affidavit submitted by Agent Lyons in support of his application for a search warrant for the "firearm" was based upon information allegedly obtained by him from an informant. Additionally, Agent Lyons' testimony on direct examination that the subpoenas were made returnable forthwith because he had determined that the petitioners' records might, otherwise, never reach the grand jury, was based upon information he allegedly had obtained from the same source. The person who allegedly provided this information was a former employee of the petitioners and they knew her identity. Although the petitioners attempted to subpoena her to testify at the hearing on the motion for return (Tr. 200-201), she was under the protection of the United States Marshal Service and could not be located (Tr. 222-223). The petitioners, therefore, moved the district court to direct the government to produce the informant to testify (Tr. 224), so that the petitioners could demonstrate the falsity of Lyons' claim that a danger existed that the petitioners' business records would be destroyed and the falsity of the affidavit for the search warrant (Tr. 225-227). The petitioners argued that such testimony would demonstrate the government's bad faith in obtaining the search warrant in order to insure that they could gain access to petitioners' premises and the government's bad faith in using "forth-

with" subpoenas to obtain the petitioners' records. Such testimony, the petitioners argued, would substantially reduce the credibility of the government's witnesses, particularly its chief witness, Lyons (Tr. 225-227). The government opposed the petitioners' request, and the district court overruled it, apparently on the ground that the informant's testimony would be irrelevant (Tr. 228).

In the court of appeals, the petitioners argued that it was prejudicial error for the trial court to overrule the petitioners' request that the informant be produced. The court of appeals, however, affirmed the district court's order in this case without any comment upon this claim of error by the petitioners. An important issue, which has been preserved by the petitioners, is, therefore, presented concerning the refusal of the district court to permit the petitioners to elicit vital testimony from the informant, whose identity was known by the petitioners.

Petitioners submit that there simply was no basis for the trial court's refusal to direct that the government produce its informant. Certainly the privilege recognized in this Court's decision in *Rovario v. United States,* 363 U.S. 53 (1957) of the government to withhold the *identity* of persons who furnish information to law enforcement officers had no application to this case. This is because the privilege is inapplicable once the identity of the informant has been disclosed, as was the case here. *Rovario v. United States, supra,* at 353 U.S. 59; *see United States v. Gomez-Rojas,* 507 F. 2d 1213, 1219 (5th Cir. 1975), *cert. denied,* 423 U.S. 826 (1976); *United States v. Day,* 384 F. 2d 464, 465 (3rd Cir. 1967); *Gordon v. United States,* 438 F. 2d 858, 875 (5th Cir. 1971), *cert. denied,* 404 U.S. 828 (1971); *United States v. Long,* 533 F. 2d 505, 507 (9th Cir. 1976).

Furthermore, the testimony sought by the petitioners was central to the issues raised in their motion for return of property. This is particularly borne out by the fact that the district court's order overruling the motion for return was based, in large part, upon that court's expressed determination "to assign greater credibility and weight to the Government's witnesses than to plaintiffs'."[15] In view of that determination, the district court's refusal to permit the petitioners to question the government's informant was particularly prejudicial because it deprived the petitioners of the one witness who could have supplied evidence which would have destroyed the credibility of the very government witnesses upon whose testimony the district court so heavily relied.

An important question, therefore, is presented concerning the district court's decision to overrule the petitioners' request that the informant, their former employee, be produced to testify. For this reason as well, the writ of certiorari should be granted.

Conclusion

For the reasons stated, the petitioners respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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[15] See Appendix, *infra* at 31a.

APPENDIX

Order

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

76-2583

CONSUMER CREDIT INSURANCE AGENCY, INC., *et al.*,

Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Filed August 8, 1979.

Before:

WEICK, ENGEL and MERRITT,

Circuit Judges.

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the plaintiffs-appellants has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby denied. Judge Weick adheres to his dissent.

ENTERED BY ORDER OF THE COURT

JOHN P. HERMAN

Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 76-2583

CONSUMER CREDIT INSURANCE AGENCY, INC., *et al.*,

Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed June 13, 1979.

Before:

WEICK, ENGEL and MERRITT,

Circuit Judges.

ENGEL, Circuit Judge, delivered the opinion of the Court, in which MERRITT, Circuit Judge, joined. WEICK, Circuit Judge (pp. 9-20) filed a separate dissenting opinion.

ENGEL, Circuit Judge. Plaintiffs commenced an action in the district court pursuant to Rule 41(e), Fed. R. Crim. P., seeking return of certain corporate books, correspondence, memoranda, books of account and like corporate documents, which they alleged had been unlawfully seized pursuant to "forthwith" grand jury subpoenas *duces tecum*.

On the morning of September 10, 1976, Special Agent Terry

A. Lyons of the FBI went to the office building at 514 Prospect Avenue, Cleveland, Ohio, wherein plaintiffs had their offices on the fifth floor. On the ground floor he identified and introduced himself to Allan M. Wachs, who worked for the plaintiffs in the building. Lyons and Wachs had known each other as the result of a previous investigation of the affairs of the Northern Ohio Bank. Upon Lyons' representation that he wanted to discuss Wachs' business activities with him, Lyons was invited to proceed to the company's fifth floor offices for the purpose of continuing the discussion. At that time Lyons was joined by Special Agents Fetterman and Graessle.

Once access had been gained to the fifth floor, Lyons served two "forthwith" subpoenas *duces tecum* upon Wachs and Thomas D. Bosse, who arrived shortly after the agents. Bosse, like Wachs, was employed by the plaintiffs and, the trial court found, was in charge of the office. At that time Bosse was also served with a warrant for the search of "[t]he top right hand drawer of a brown wooden desk used by Gennaro J. Orrico" for a firearm which was believed to have been possessed by him there in violation of 18 U.S.C. App. §1202(a)(1)(1976).[1] Upon service of the subpoena and of the search warrant, Bosse immediately advised the agents that he would consult with his attorney and thereupon put a call in to Robert H. Jackson, a partner in the law firm of Kohrman & Jackson Company, LPA, legal counsel for plaintiff corporations and Bosse. The government agents were then joined by Kenneth A. Bravo, Special Attorney for the Department of Justice assigned to the Strike Force, and two additional FBI agents.

After substantial discussion between Wachs, Bosse and one Stephen Kalette, an attorney with the law firm of Kohrman & Jackson who had meanwhile arrived pursuant to Bosse's call,

[1] The search of the drawer produced a handgun, as indicated, but it later turned out to be an imitation.

Robert H. Jackson appeared on the scene to consult with Wachs, Bosse and Kalette and to examine the subpoenas. Bosse, with Jackson's concurrence, asked that Bravo and the FBI agents stay in order to determine whether certain records were covered by the subpoenas. Jackson then departed, leaving Kalette to render further counsel.

For the remainder of the morning and into mid-afternoon Bosse, Wachs and Kalette continued intermittently to express their desire to cooperate in satisfying the requirements of the subpoenas. None of these individuals nor anyone else, according to the district court's findings, requested or directed the agents to leave the premises. Any examination of the records by the agents was found to have been upon the express consent of Bosse and Wachs, with no objection from Kalette. Immediately prior to the removal of the documents, Jackson was contacted by telephone for advice, yet thereafter Wachs, Bosse and Kalette continued to cooperate with the agents. After the review of plaintiffs' files was completed, the documents whose return is now sought were produced and delivered to the grand jury for use in its then-pending investigations.

The plaintiffs' motion made before the district court detailed a number of charges that the subpoenas were invalid and that the government conduct under the circumstances here was so tainted that they were in all events entitled to relief. Essentially they claimed that the subpoenas were overbroad, that the search warrant was but a ruse to enable the officers to gain entrance to the building, and that in the service of the subpoenas, the FBI agents were guilty of trespass and of threats and intimidation which coerced them into consenting to the delivery of the documents and which rendered their consent invalid.

An evidentiary hearing was held before United States District Judge Robert B. Krupansky, who thereafter filed extensive factual findings, concluding that the plaintiffs' consent to the search had been voluntary and that the documents had been lawfully seized. The court made the following ruling:

> [P]laintiffs' Motion for Return of Seized Property, pursuant to Rule 41(e), Fed. R. Crim. P., must be and hereby is denied. It appearing to the Court, however, that the great volume of documents subpoenaed from petitioners could understandably impede the operation of their business for a protracted period, the Court hereby ORDERS the Government to return to petitioners the originals of all documents produced pursuant to the instant subpoenas duces tecum by October 18, 1976. This Order does not preclude the Government from copying any or all such records.[2]

Our review of the record convinces us that there is much in the conduct of the officers here which we cannot approve if

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[2] We are troubled by the issue of jurisdiction over the appeal from the district court's order, but in view of our conclusion that plaintiffs are not in any event entitled to relief under Rule 41(e), we find it unnecessary to resolve the question. We do not conceive that the issue of appellate jurisdiction is resolved solely by reference to whether a criminal proceeding has been initiated by indictment or information. As the Supreme Court held in *DiBella v. United States*, 369 U.S. 121 (1962): "the mere circumstance of a pre-indictment motion [under Rule 41(e)] does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality *even for purposes of appealability.*" *Id.* at 131 (emphasis added). Based upon the relationship between a Rule 41(e) proceeding and the ongoing grand jury process, and the importance of avoiding a bifurcation even where no indictment has been returned, *see id.* at 126-29, the Court concluded that a ruling upon a pre-indictment motion under Rule 41(e) is appealable in the following limited circumstance: "*Only* if the motion is *solely* for return of property *and* is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent." *Id.* at 131-32 (emphasis added). Both conditions must be satisfied. *See Hill v. United States*, 346 F. 2d 175, 178 (9th Cir.) *cert. denied*, 382 U.S. 956 (1965). *See generally* C. Wright, Federal Practice & Procedure: Criminal § 678 at 139 (1969) (*DiBella* "sharply restricted" the notion that the denial of a pre-indictment motion under Rule 41(e) is final and appealable).

Bearing in mind that the burden is upon the appellants to satisfy the court that it has jurisdiction over the appeal, *see Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884); *Chapman*

plaintiffs' version of the facts is to believed. Nonetheless, after personally hearing the witnesses, Judge Krupansky elected to assign greater weight and credibility to the government's witnesses than to the plaintiffs' with respect to the issue of voluntariness. In support of his finding is the fact that plaintiffs' agents consented to the examination and delivery of documents only after advice of their counsel, Jackson, and his associate, Kalette, who was present at the scene during the entire episode and who oversaw and approved the final delivery of possession to the agents. It is also noteworthy that Jackson testified to having advised Bosse that he was not required to turn over the documents sought.

We are not impressed with plaintiffs' characterization that Kalette, the attorney sent from the firm of Kohrman & Jackson,

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v. Houston Welfare Rights Organization, 47 U.S.L.W. 4528, 4531 n.28 (U.S. May 14, 1979), we entertain doubts whether the instant appeal pertains "solely" to return of property, the district court having ordered the government to return the originals. In other words, any interest which plaintiffs have in receiving their business records has been fully met; the remaining relief sought on appeal is to deprive the government of any further evidence derived from the documents. While the plaintiffs represent that they "are not seeking suppression of [the] copies but only their return," the necessary consequence of enlarging the relief granted by the district court is that the evidence will be unavailable for the grand jury's further consideration. *But see United States v. Calandra*, 414 U.S. 338 (1974) (exclusionary rule inapplicable to grand jury proceedings). In this circumstance we conceive that an appeal aimed solely at the return of copies may lack the requisite independence from the extant grand jury probe, *Meister v. United States*, 397 F. 2d 268 (3d Cir. 1968), even accepting *arguendo* the proposition that, on the merits of the claim, Rule 41(e) applies to copies as well as originals. *Goodman v. United States*, 369 F. 2d 166, 168 (9th Cir. 1966). We do not read *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), as addressing the issue, let alone settling it. To the extent that the case is relevant, *G.M. Leasing* supports the conclusion that the within appeal is premature, particularly in view of the Court's favorable reference on this point to *Meister, supra*, 429 U.S. at 359.

was only a "law clerk" and somehow allowed himself to be intimidated by the aggressive behavior of the government agents. He was admitted to practice; he was sent by a responsible law firm; he was accepted by the clients for that purpose, and had been introduced to the agents by Bosse and Wachs as "their attorney." He gave advice to them, and they followed that advice. Moreover, the evidence showed that Jackson, Kalette's superior, also participated significantly in the rendering of advice. In the absence of other persuasive evidence, we do not think it is appropriate to assume, because of the attorney's relative inexperience, that he was incompetent to give proper advice or that any consent based upon the advice he actually gave was involuntary under the circumstances. Judge Krupansky did not.

Appellants also rely upon a confrontation between Special Attorney Bravo and Orrico, who arrived at 2:35 p.m. and who was then served with a subpoena identical to the two previously served upon Wachs and Bosse. While Orrico's testimony stresses the coercive nature of the events in issue, Bravo's testimony places the incident in a different light:

> [The conversation occurred] just at the time we were getting ready to leave and we were located in the large open area of the office in the end, close to the elevators. Mr. Orrico began talking, I don't believe at first directly to me, saying that he was not going to the Grand Jury and then he looked in the direction of Agent Lyons and myself and said, "If you want me to go you're going to have to take me in handcuffs."
>
> I then explained to Mr. Orrico that he had been served with a subpoena, that until such time as a Court ruled to the contrary I expected that he would obey that subpoena and in the event he did not, we would have no alternative but to ask a Federal Judge in this district to rule on the question of whether or not a warrant should be issued.

It is clear from the foregoing that Orrico objected not so much to the collection of documents, at issue here, as to the subpoena insofar as it called for his personal presence. Moreover, the district court failed to find, as plaintiffs urged, that Bravo "threatened" Orrico.

Following Orrico's recalcitrance Bravo talked to Bosse, informing him of the possible adverse publicity which would attend noncompliance. In fact, apparently unknown to Bravo, plaintiffs' attorney Jackson had likewise earlier counselled Bosse that resistance could generate adverse publicity. Bosse then talked to Orrico and prevailed upon him to comply.

We cannot agree that Bravo's statements to Bosse and Orrico were coercive and overbore their will. The agent's observations were not shown to have been untrue, and they may have in fact been realistic arguments which a prudent businessman would have wished to consider in determining whether to comply. Moreover, Kalette was on the scene to provide advice, and Jackson was consulted by telephone. That compliance was obtained only after extensive consultations with counsel diminishes whatever coercive effect Bravo's statements may have had.

The plaintiffs also claim that the officers, after having executed the search warrant and having served the subpoenas, should immediately have left the premises. We might agree if the trial judge had found that they had been asked to leave. They were not, however, but rather had been invited to stay by Bosse, found by the district court to be in charge of the office, in order that they might assist in compliance. We reject the claim that their presence on the premises amounted to so high a degree of coercion under the circumstances as to nullify the otherwise proper effect of the subpoenas in producing the documents desired, since, as the district court found, the agents "never entered into any physical space without the express permission of plaintiffs," and in fact remained upon an express invitation to do so. It must be remembered that these were business offices,

that the agents entered in the company of and with the permission of Wachs, that entry was in the daytime, and that there were other office employees present at the time, thus diminishing any impact of a show of force. While we do not condone the procedure employed by the government, we accept the district court's finding that compliance was voluntary. We hold, in conclusion, that the plaintiffs were not "aggrieved by an unlawful search and seizure" and are thus not entitled to relief under Rule 41(e).[3]

Finally, we are bound to note that while in a technical sense, the motion was denied, the trial judge has in fact granted the plaintiffs the relief which they initially sought: return of the documents, subject, however, to the government's right to make copies. To the extent that the motion for return stems from plaintiffs' concern for the privacy interests of themselves and their clients, we conceive that their remedy at this stage is to seek a protective order in the district court under Rule 6(e), Fed. R. Crim. P., which would effectively recognize those rights, limiting the disclosure and use of the copies to the grand jury proceedings and any criminal prosecutions which may follow in their wake. While the plaintiffs have not seen fit to do so, we have no doubt that the district judge, who carefully considered their interests in the first place, would be fully willing and able to consider such a protective order.

Affirmed.

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[3] In view of our conclusion that the custodians consented to the delivery of plaintiffs' records, we find it unnecessary to reach the claim that the documents were illegally seized because the subpoenas were too sweeping in their scope to be considered reasonable. *See, e.g., Hale v. Henkel,* 201 U.S. 43, 76 (1906). We note that the government has not claimed that there remain further documents and has not sought court enforcement of the subpoenas with respect to other evidence not voluntarily provided. Our holding is without prejudice to any right of plaintiffs to resist further disclosures.

WEICK, Circuit Judge. I respectfully dissent. The majority opinion permits the FBI to effect an unlawful search and seizure of all the books and records of the plaintiff corporations for a period covering the thirty-three months immediately preceding the seizure, by using as many as five FBI agents and one Special Attorney of the Department of Justice to coerce immediate compliance with overbroad, unlawful forthwith grand jury subpoenas duces tecum. It constituted a gross abuse of the Grand Jury process.

Actually, unless coercion was intended, the grand jury subpoenas could and should have been served by a single United States Marshal and after serving the subpoenas the Marshal should leave the premises of the subpoenaed persons.

In footnote 2 the majority is "troubled" about the Court's jurisdiction over this appeal, but found it unnecessary to resolve that question because of its conclusion that plaintiffs are not entitled to relief. However, the majority should not be troubled because if this Court had no jurisdiction the majority was without power to rule on the merits of the case, and its decision on the merits would be pure obiter dictum.

The Government never filed a motion to dismiss the appeal for lack of jurisdiction, no doubt because such a claim would be plainly frivolous.

I

The majority, in footnote 2, correctly states the applicable jurisdictional rule. The order is appealable "only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant. . . ." *DiBella v. United States,* 369 U.S. 121, 131-32 (1962). The plaintiffs herein have appealed from the entire order of the District Court quoted by the majority, *ante* at 5, which *began* by denying the motion for return of seized property. Denial of such a motion is plainly appealable. If that ruling was incorrect, as I believe it to be, the

District Court was not entitled, *sua sponte,* to authorize the Government to make copies because the entire order was invalid.

The majority would use the "relief" granted by the District Court, which was never sought by either party, to change the nature of the motion brought by the plaintiffs. The fact is that the plaintiffs have never sought other than the return of property. There is simply no reason to treat the motion other than as the plaintiffs have brought it.

Moreover, even if one views this case as only involving copies, there is ample authority that copies are property and may properly be the subject of a motion for return of property. *Richey v. Smith,* 515 F.2d 1239, 1242-43 n.5 (5th Cir. 1975); *VonderAhe v. Howland,* 508 F.2d 364, 368 (9th Cir. 1975); *Hunsucker v. Phinney,* 497 F.2d 29, 35 (5th Cir. 1974), *cert. denied,* 420 U.S. 927 (1975); *Goodman v. United States,* 369 F.2d 166 (9th Cir. 1966). *But see Meister v. United States,* 397 F.2d 268 (3d Cir. 1968) (per curiam). Also the majority ignores the fact that in *G.M. Leasing Co. v. United States,* 429 U.S. 338, 359 (1977), the Court found that the motion for return of property was moot both because the originals had been returned, *and because the photocopies had been destroyed.*

Finally, although the majority opinion is unclear on this point, it is plain that the present motion is "in no way tied to a criminal prosecution *in esse* against the movant . . . ." *DiBella, supra,* 369 U.S. at 132. In the more than two and one-half years since the District Court entered its order, two separate Grand Juries have had access to the documents, and yet neither Grand Jury has handed down any indictments relating to these records and the plaintiffs or their custodians. Thus, this is not a case "[w]hen at the time of ruling there is outstanding a complaint, or a detention or a release on bail following arrest, or an arraignment, information, or indictment . . .," *DiBella, supra,* 369 U.S. at 131, so that there is in fact "no criminal prosecution pending against the movant," *United States v. Ryan,* 402 U.S. 530, 533 (1971).

See Soverign News Co. v. United States, 544 F.2d 909 (6th Cir. 1976) (per curiam), *cert. denied,* 434 U.S. 817 (1977).

In my view the order was final and was fully appealable. *See United States v. Williams,* 459 F.2d 909 (6th Cir. 1972) (per curiam); *Coury v. United States,* 426 F.2d 1354 (6th Cir. 1970).

II

I am not unmindful that the voluntariness of the consent in this case is "a question of fact to be determined from the totality of all the circumstances," *Schneckloth v. Bustamonte,* 412 U.S. 218, 227 (1973). As such, the District Court's finding must be clearly erroneous before we can overturn it, *United States v. Hearn,* 496 F.2d 236, 242 (6th Cir. 1974); but as we recently said in *United States v. McCaleb* 552 F.2d 717, 721 (6th Cir. 1977):

> Consent "must be proved by 'clear and positive testimony,' *Amos v. United States,* 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654 (1921), and 'must be unequivocal, specific and intelligently given, uncontaminated by *any duress or coercion,' Simmons v. Bomar,* 349 F.2d 365 (6th Cir. 1965)." *United States v. Hearn, supra,* 496 F.2d at 244. [Emphasis added.]

At the outset, it must be noted that the majority has totally ignored the fact that the FBI engaged in what is, at minimum, the highly unusual procedure of using as many as five FBI agents and one Special Attorney to serve and "enforce" forthwith grand jury subpoenas duces tecum. The normal practice, and the one which is contemplated by the Federal Rules of Criminal and Civil Procedure, is that subpoenas will be served by a U.S. Marshal. Fed.R.Cr.P. 17(d); Fed.R.Civ.P. 45(c); *see* L.Cr.R. 3(d) (N.D. Ohio). The majority also ignores the fact that the plaintiffs' building was equipped with a locked security system. The agents achieved admittance through the system only after making

obscure references to "business" which had to be discussed with Wachs. His subpoena could have been served on the street, but was not.

The majority makes much of the fact that the agents allegedly were "requested" to remain in order to aid in the assembly of documents. They ignore, however, the fact that Agent Lyons' testimony showed the absence of any "request" for the federal agents to remain on the premises until after they had already been there for more than an hour. App. 76, 77. Moreover, there is no suggestion whatever that the plaintiffs' custodians ever "requested" the FBI personnel to summon the help of Special Attorney Bravo and the two additional FBI agents that he brought with him.

It is apparent that from almost the outset, three FBI agents and one Government attorney were present on the plaintiffs' premises. Unless the agents, from the beginning, intended to enforce compliance with the subpoenas I can find no reason for such an initial show of force, particularly after the execution of the search warrant and the removal of the toy pistol which had been used as a paper weight, and which was found in a desk drawer.

As soon as the agents had executed the search warrant and had completed service of the three forthwith subpoenas duces tecum, they had finished their task and should have left the premises immediately. The obvious purpose of their remaining at the plaintiffs' place of business was for duress and coercion, to enforce compliance with the forthwith subpoenas. This was not their function and they had no lawful right to engage in such activity.

In this context the use of the forthwith command itself became coercive.[1] The record shows that the federal agents more

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[1] Of course, the use of a forthwith subpoena will not in most circumstances work to vitiate otherwise voluntary compliance. Certainly it is proper to require forthwith return where the grand jury has

than once emphasized that they expected immediate compliance. App. 105, 175, 298. At no time did the agents or Special Attorney Bravo inform the plaintiffs' custodians of the right to refuse to comply in order to seek to test the validity of the subpoenas. *See Schneckloth, supra,* 412 U.S. at 227. If anything, the inference from their statements was that the plaintiffs' custodians had no choice but to comply at once. It appears that the forthwith command simply provided the agents with an excuse to remain on the premises until either compliance was effected or they were forced to leave.

It may also be noted that the District Court found that the FBI provided the van to carry the records only after the plaintiffs' custodians stated that they had no means to transport the file cabinet and three cartons of documents. While this finding is supported in the record, it is also consistent with a plan by the agents to ensure that they obtained immediate custody of the

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reason to believe that the items might otherwise be destroyed. But the danger of the forthwith subpoena is that it places a premium on the party's knowledge of his right to refuse until the subpoena has been tested in court. Its use tends to blur the distinction between traditional arrests and searches, on the one hand, and traditional subpoenas on the other. As the Supreme Court recognized in *United States v. Dionisio,* 410 U.S. 1, 10 (1973):

> The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest . . .
>
> > "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances. . . . A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court."
> >
> > United States v. Doe (Schwartz). 457 F.2d at 898.

Since subpoenas are generally served without any antecedent judicial intervention, reviewing courts should be cautious where it appears that the forthwith requirement may have been used to preclude any review.

documents. Indeed, Agent Lyons admitted that the agents chose to obtain the records by means of a forthwith subpoena duces tecum because they lacked probable cause to obtain a search warrant. While it is axiomatic that the grand jury need not have probable cause to issue a subpoena, *see United States v. Bisceglia,* 420 U.S. 141, 147-48 (1975), the subpoena itself cannot be transformed into an instrument by which an illegal search or seizure is effectuated. *Mancusi v. DeForte,* 392 U.S. 364 (1968); *see United States v. Ryan,* 455 F.2d 728 (9th Cir. 1972).

The majority relies heavily on the fact that the plaintiffs' custodians acted with the advice and assistance of counsel. While the presence of counsel is a factor to consider, *Schneckloth, supra,* 412 U.S. at 226, it is not conclusive. The undisputed evidence showed that the plaintiffs' attorney was unfamiliar with criminal practice and the procedures surrounding forthwith subpoenas, and that this fact was communicated to Bosse. App. 222, 225. Thus the normal salutary effect of counsel's presence was diminished in this case.

The majority states that attorney Jackson told Bosse that he was not "required" to turn over the documents. I believe that a fair reading of that portion of the record shows that Jackson advised that Bosse could "resist physically," but that Jackson did not know what the legal consequences of such an action would be. Jackson suggested that such resistance might subject Bosse to arrest. App. 220-28.

It is plain that Jackson *never* advised that Bosse had the right to test the validity of the forthwith grand jury subpoenas by filing a motion in court prior to turning over the documents. Any suggestion to the contrary is simply wrong.

The majority also relies on the advice provided by attorney Kalette, Jackson's young associate. The evidence showed rather plainly that Kalette initially tried only to preserve the status quo pending the arrival of attorney Jackson. The majority does not

appear to contend otherwise. And the District Court found that after Jackson left, Kalette's activities were pursuant to Jackson's instructions. There is simply no evidence that Kalette's advice was ever any different or any better than that offered by Jackson.

It is also significant to note that the plaintiffs hired a new law firm to represent them in this matter almost immediately after the documents were delivered to the Grand Jury. Within six days of the delivery of the records, the motion presently before this Court was filed in the District Court. The plaintiffs were evidently dissatisfied with the quality of the advice and representation provided by Jackson and Kalette.

The majority does state:

> . . . [T]here is much in the conduct of the officers here which we cannot approve if plaintiffs' version of the facts is to be believed.

Nevertheless, however politely the majority wishes to view it, it is clear from the record that Special Attorney Bravo admitted that he threatened Orrico with arrest and threatened Bosse with unfavorable publicity when Orrico initially refused to comply with the subpoenas. Whether his primary objection was to personal appearance or to the production of documents, the fact is that Orrico was threatened when he indicated a desire to resist *immediate compliance.*

Accordingly, even if one assigns greater weight and credibility to the testimony of the Government's witnesses, the following facts emerge as uncontroverted: First, at least three, and as many as six, Government agents (including Special Attorney Bravo) were present on the plaintiffs' premises for over an hour before any "request" was made that they stay at all. Second, the FBI agents and Special Attorney Bravo repeatedly emphasized that the forthwith command of the subpoenas mandated immediate compliance. Third, the plaintiffs' custodians were never informed by the Government agents of the right to refuse compliance in order to test the validity of the subpoenas. Fourth, Special Attorney Bravo admittedly threatened plaintiffs' custodians with arrest and with unfavorable publicity. Fifth, the normally beneficial effects of the advice and presence of counsel were reduced in this case because Attorney Jackson expressed ignorance of the plaintiffs' rights under a forthwith subpoena duces tecum, and the plaintiffs did obtain, promptly, other counsel to file their motion for the return of property.

In my opinion the duress and coercion exerted here was much greater than that which was involved in *United States v. McCaleb,* 552 F.2d 717 (6th Cir. 1977), which condemned *"any duress or coercion," id* at 721 (emphasis added), quoting *Simmons v. Bomar,* 349 F.2d 365, 366 (6th Cir. 1965) (per curiam).

Because of the uncontroverted evidence as to duress and coercion, the District Court's conclusion that the compliance was voluntary is not supported by substantial evidence, and is clearly erroneous.

III

The plaintiffs are not entitled to relief under Fed.R.Cr.P. 41(e) unless they have established that they are entitled to the lawful possession of property which has been illegally seized. A subpoena duces tecum will constitute such an illegal seizure when it is "far too sweeping in its terms to be regarded as reasonable." *Hale v. Henkel,* 201 U.S. 43, 76 (1906). *See e.g., Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 208 (1946); *Brown v. United States,* 276 U.S. 134, 142-43 (1928); *Boyd v. United States,* 116 U.S. 616, 621-22 (1886). The present subpoenas were unreasonable and therefore unlawful.

The cases demonstrate that in addition to the requirement that the Grand Jury pursue an investigation only "for a lawfully

authorized purpose," *Oklahoma Press Publishing Co., supra,* 327 U.S. at 209, a Grand Jury subpoena duces tecum must limit its scope to matters somehow relevant to the investigation, and must limit its burdensomeness by specifying the documents desired with reasonable particularity, and by focusing on a reasonable time period. *Id.; United States v. Gurule,* 437 F.2d 239, 244 (10th Cir. 1970), *cert. denied sub nom. Baker v. United States,* 403 U.S. 904 (1971); *Schwimmer v. United States,* 232 F.2d 855, 861 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956); *McMann v. S.E.C.,* 87 F.2d 377, 379 (2d Cir.), *cert. denied,* 301 U.S. 684 (1937). And in evaluating the burden imposed, it is important to consider whether the documents sought are part of an ongoing business, or instead relate to a defunct operation. *Hale v. Henkel, supra,* 201 U.S. at 76-77; *In re Horowitz,* 482 F.2d 72, 79 (2d Cir., *cert. denied,* 414 U.S. 867 (1973); *cf. Wheeler v. United States,* 226 U.S. 478 (1913). In addition, other factors may be considered in appropriate cases. *Oklahoma Press Publishing Co., supra,* 327 U.S. at 209; *Boyd v. United States, supra,* 116 U.S. at 630.

There is no fixed requirement that the subpoenas recite either the purpose of the investigation or the precise relevance of each document sought, although these matters may be inquired into by the District Court on an appropriate motion. What is required, however, is that the subpoena duces tecum express limitations as to the time period involved and either as to the subject matter or the class of documents sought, or both, as appropriate. No precise formula can be stated. The requirements of "reasonableness" will vary in each case, but will almost certainly include consideration of the type of documents sought, the age of the documents, the availability of the documents, the requirements of the particular business, as well as the type of investigation being conducted. *See Oklahoma Press Publishing Co., supra,* 327 U.S. at 208-09; *Hale v. Henkel, supra,* 201 U.S. at 76-77.

In the present case the subpoenas commanded the production forthwith of:

> all books and records of Consumer Credit Insurance Agency, Inc., Consumer Fidelity Insurance Agency, Inc., Lee Hoffman and Associates, Thomas A. Mills and Associates, Inc., and American International Assurance Co., Ltd., for the period from January 1, 1974 to September 9, 1976 said records to include, but not be limited to, corporate minute book(s), correspondence, memoranda, books of account including all journals and ledgers, bank statements, cancelled checks, check stubs, saving account books, records of all insurance policies written, computer printouts, all agreements, contracts, treaties, or understandings with any insurance companies and any agreements, contracts, treaties or understandings with any automobile, trailer, boat or mobile home dealers.

By their terms they required the production of "all books and records" of the five companies, including, but not limited to:

> corporate minute book(s), correspondence, memoranda, books of account, including all journals and ledgers, bank statements, cancelled checks, check stubs, savings account books, records of all insurance policies written, computer printouts. . . .

Only two categories of items were limited to a particular type of transaction:

> . . . all agreements, contracts, treaties, or understandings with any insurance companies and any agreements, contracts, treaties or understandings with any automobile, trailer, boat, or mobile home dealers.

It can be fairly said that the subpoenas required the production of all of the plaintiff's business records for the period of two

years and nine months immediately preceding the date of service of the subpoenas. Moreover, it would be difficult to find a clearer case where the production of documents "more completely put a stop to the [plaintiffs'] business . . . ." *Hale v. Henkel, supra,* 201 U.S. at 77.

The District Court explicitly recognized this when it ordered the return of the originals. Moreover, it is noteworthy that the District Judge quashed a fourth substantively identical subpoena served on one of the plaintiffs' employees, Paul Paczolt, because the Court found the subpoena was impermissibly overbroad. *In re Grand Jury Subpoena Addressed to Paul Paczolt, Custodian of Records,* No. C-76-998 (N.D. Ohio, Sept. 17, 1976). This holding by the same District Judge supports the plaintiffs' contention that the three identical forthwith subpoenas in the present case are invalid as being impermissibly overbroad and unreasonable.

In its brief, the Government relies on *Bellis v. United States,* 417 U.S. 85 (1974), for the proposition that a subpoena duces tecum which requires the production of records covering two years is not invalid. Aside from the fact that *Bellis* deals with an asserted Fifth Amendment privilege, and not a Fourth Amendment violation, it is important to note that the subpoena in *Bellis* had been judicially limited to financial records, 417 U.S. at 86-87 & n.1, and that it related to a partnership no longer in existence. It did not, as in the present case, stop the operation of plaintiffs' business.

Similarly, *Wheeler v. United States, supra,* also cited by the Government, involved the records of a defunct corporation, and the subpoena particularly stated the classes of records sought, if not the particular subject matter. *See* 226 U.S. at 483, 489-90.

Finally, in *Brown v. United States, supra,* the subpoenas specified the subject matters of the requested records. In addition, Brown had previously complied with an identical subpoena without difficulty. 276 U.S. at 143.

In this case the Grand Jury forthwith subpoenas duces tecum amounted to an illegal search and seizure. They demanded, without any substantial limitation as to the subject matter of the class of document sought, the forthwith production of all of the business records of the plaintiffs for a period of two years and nine months. Because of their sweeping command, and because they focused on the most current records, these subpoenas unreasonably burdened the plaintiffs and interfered impermissibly with the ongoing operation of their businesses. Such an unlawful practice should be stopped in its tracks by the Court.

The judgment of the District Court should be reversed and the cause remanded with instructions to order the return of the copies of the records to the plaintiffs.

Order

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C76-998

CONSUMER CREDIT INSURANCE AGENCY, INC., *et al.*,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant.

Filed October 5, 1976.

KRUPANSKY, *J.*

Plaintiffs have initiated this action pursuant to Rule 41(e), Fed. R. Crim. P., seeking the return of corporate minute books, correspondence, memoranda, books of account, bank statements, cancelled checks, check stubs, savings account books, computer printouts, agreements, contracts, production reports, financial and other business records, asserting illegal search and seizure, in violation of the Fourth Amendment, of said documents from premises situated at 514 Prospect Avenue, Cleveland, Ohio on September 10, 1976 by Agents of the Federal Bureau of Investigation (FBI),

The evidence disclosed that on the morning of September 10, 1976, between approximately 9:15 a.m. and 9:30 a.m., Allan M. Wachs (Wachs) and Thomas D. Bosse (Bosse) arrived via personal automobile at the parking lot located adjacent to 514 Prospect Avenue, Cleveland, Ohio. The two men exchanged greetings. Wachs proceeded to the entrance of the building at 514 Prospect Avenue and Bosse to a restaurant in the vicinity for coffee and donuts. Immediately in front of the building, Terry A. Lyons (Lyons) approached Wachs, presented credentials identifying himself as a Special Agent of the FBI and indicated that he was desirous of discussing with Wachs certain of his business activities. Lyons and Wachs were known to each other as a result of a previous investigation involving the affairs of the Northern Ohio Bank. Wachs invited Lyons, who had been joined by Special Agents Jay Fetterman (Fetterman) and Fred Graessle (Graessle) to accompany him to his fifth floor office for purposes of continuing the discussions. The four men entered the foyer of the building, whereupon Wachs placed a telephone call to the fifth floor offices and requested that the elevator be sent down to the first floor. A buzzer signalled the electronic opening of a second door through which the group proceeded to the elevator which carried them to the fifth floor. The men followed Wachs to his office. Upon entering the office, Lyons served Wachs with a forthwith subpoena duces tecum (Gov't Exh. 1). Immediately subsequent to reading the subpoena, Lyons served Wachs with a search warrant (Pl. Exh. A) authorizing the agents to search

> the top right-hand drawer of a brown wooden desk used by Gennaro J. Orrico located on the fifth floor, 514 Prospect Avenue, Cleveland, Ohio, in the office occupied by Consumer Credit Insurance Agency, Inc.

for

> a firearm which is being possessed in violation of Title 18, U.S.C., App. Section 1202(a)(1).

At approximately this point in time, Bosse appeared in the office. Lyons, identifying himself, served Bosse with a forthwith subpoena duces tecum (Gov't Exh. 2). Wachs presented the search warrant to Bosse for examination. Upon examining both documents, Bosse immediately advised the agents that he would consult with his attorney, thereupon proceeded to his office, and placed a telephone call to Robert H. Jackson (Jackson), a partner in the law firm of Kohrman & Jackson Company, L.P.A., legal counsel for the plaintiff corporations and Bosse. It should be noted that at no time did the agents interfere with or restrain the movements of either Wachs or Bosse.

During Bosse's absence, Wachs directed the agents into the office of Gennaro J. Orrico (Orrico), whereupon Lyons searched the top right-hand drawer of a brown wooden desk used by Orrico and confiscated a hand gun. No further search of Orrico's office was conducted and the agents immediately returned to Wachs' office. Immediately thereafter, Bosse reappeared, advising the agents that Jackson was on his way to the offices; Lyons accordingly directed Fetterman to place a telephone call to Special Agent James Manning (Manning), requesting the presence of a Strike Force Attorney. Thereafter, Manning arrived with Special Agent John Billi (Billi), and Kenneth A. Bravo (Bravo), Special Attorney for the United States Department of Justice, assigned to the Strike Force.

At approximately 10:00 a.m. Steve Kollette (Kollette), an attorney with the law firm of Kohrman & Jackson, arrived, and shortly thereafter, agents Manning and Billi departed the premises. Kollette was introduced to the

agents by Bosse and Wachs as "their attorney," whereupon Kollette, Bosse and Wachs retired for a conference. Within fifteen minutes, Jackson made his appearance, conferred first with Bravo and then with Kollette, Bosse and Wachs. At the conclusion of the conference, Jackson, Kollette, Bosse and Wachs proceeded to a conference room for discussions with Bravo, Lyons, Fetterman and Graessle. Jackson and Bosse reviewed the subpoenas, indicating to Bravo and the agents various records that were available upon the premises. Jackson and Bosse also expressed a desire to cooperate by furnishing the available subpoenaed documents and suggested that Bravo and the agents remain upon the premises to assist in identifying the records and documents listed in the subpoenas. To this point in time, neither Bosse, Wachs nor their attorneys produced any records or documents, nor did Bravo or the agents expressly insist that any of the records and documents be produced.

Thereafter, Jackson departed and Kollette, Bosse and Wachs, under the supervision of Kollette, commenced the collection and inventory of the records and documents ultimately produced. From approximately 10:15 a.m. until 3:20 p.m., Bosse, Wachs and Kollette, in consultation with Bravo, examined a number, but not all, of the records and documents listed in the subpoenas. At various intervals throughout this period Bosse, Wachs and Kollette continued intermittently to express a desire to cooperate in satisfying the requirements of the subpoenas. Any examination of records by Bravo or the agents was pursuant to and upon express consent of Bosse, Wachs, with no objection from Kollette. Not once during the entire period did any of these individuals request or direct Bravo or the agents to leave the premises.

The documents produced pursuant to Kollette's direction were placed in a four-drawer metal filing cabinet and three cardboard containers. Bosse expressed an inability to provide the necessary transportation, prompting Lyons to offer assistance of a truck, to which proposal Bosse agreed. When the file cabinet and cartons had been placed into a truck for transportation to the courthouse, Lyons inquired of Bosse if his colleagues were desirous of accompanying the records in the truck to the courthouse. Bosse, Wachs, and Orrico, who had arrived at approximately 2:35 p.m., declined the invitation and walked to the Federal Courthouse on Public Square, accompanied by their legal counsel, Kollette.

The testimony given by Orrico is in conflict, to a degree, with the testimony offered by the Government's witnesses, who testified that no one at any time during the entire period they were upon the premises, requested or directed them to leave and that all of the parties articulated on numerous occasions an intention and desire to cooperate. Orrico, on the other hand, testified that upon his arrival on the scene at approximately 2:35 p.m., he became incensed and highly indignant upon being served a forthwith subpoena duces tecum (Gov't Exh. 3) and demanded that the agents leave the premises without the records and documents. He further testified that he conveyed these sentiments to Bosse and Wachs as well as Jackson, whom he had called by telephone after his outburst directed to the agents and Bosse. In any event, subsequent to his conversation with Jackson, the records and documents were removed without objection from Kollette, Bosse or Wachs.

Jackson, who appeared as a witness, confirmed Bosse's testimony that he received a telephone call from the latter on the morning of September 10, 1976, advising him

of the circumstances at the fifth floor offices of the plaintiffs. He also testified that he directed Kollette to the premises for the purposes of advising Bosse, thereafter arriving himself between approximately 10:20 and 10:45 a.m.; Jackson further disclosed that during his initial conference with Bosse, Wachs and Kollette, he examined both a search warrant and the forthwith subpoenas duces tecum, explained the ramifications of the said documents, including the necessity, to seek intervention of a federal judge either for enforcement or quashing the subpoena duces tecum and thereupon placed the decision of which course to pursue upon his clients. It was collectively decided between the parties that Jackson would express a desire to cooperate with the Government, but it was the true intention of the parties to contest the subpoenas. Jackson concedes that neither he nor the other individuals at any time expressed to Bravo or the agents on the premises any intention to quash the subpoenas, testimony supported by both Bosse and Wachs. Jackson testified that he departed the premises at between approximately 10:30 a.m. and 10:45 a.m., leaving Kollette to counsel Bosse and Wachs and to supervise the collection and inventory of the documents sought by the subpoenas. He testified with some ambiguity that he continued "to work on the matter" and that he placed a telephone call to Judge Thomas Lambros of the District Court. The evidence fails to disclose, however, what resulted from these efforts. What is apparent from the evidence in its entirety, is the absence of any effort on behalf of either the law firm of Kohrman & Jackson, Jackson individually and/or collectively, to initiate any legal action to quash the subpoenas either during the six remaining business hours of September 10, the following day, or during the ensuing six days, when ultimately this action was belatedly commenced.

In considering plaintiff's contention that their corporate records were the subject of an illegal search and seizure in contravention of the Fourth Amendment, it is imperative at the outset to distinguish between the production of documents commanded by a subpoena duces tecum and seizure thereof pursuant to a search warrant.

A subpoena duces tecum is a summons to produce documents or other material, the implementation of which may be, in the absence of voluntary compliance, challenged before a court prior to the imposition of sanctions. On the other hand, a search warrant is a self-executing document, issued by the Court upon a showing of probable cause, with sanctions attaching immediately for failure to comply therewith. Thus, the crucial distinction between these two documents, as articulated by Justice McKenna in his concurring opinion in *Hale v. Henkel,* 201 U.S. 43, 80 (1905) is:

> a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner. Nothing can be more direct and plain; nothing more expressive to distinguish a subpoena from a search warrant. Can a subpoena lose this essential distinction from a search warrant by the generality or speciality of its terms? I think not. The distinction is based upon what is authorized or directed to be done,—not upon the form of words by which the authority or command is given. "The quest of an officer" acts upon the things themselves,—may be secret, intrusive, accompanied by force. The service of a subpoena is but the delivery of a paper to a party,—is open and aboveboard. There is no element of trespass or force in it. It does not disturb the possession of property. It cannot be finally enforced except after challenge, and a judgment of the court upon the challenge.

In the case *sub judice,* the plaintiffs concede that the documents that are the subject of their Rule 41(e) Motion were produced pursuant to the Grand Jury subpoena duces tecum, not the search warrant. Yet they maintain that production pursuant to the forthwith subpoena in this instance must be viewed as a warrantless search and seizure, in which the Government failed to meet its burden of establishing the plaintiffs' consent thereto, as mandated by the Supreme Court in *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

The Court is appreciative that in the proper circumstances, a forthwith subpoena duces tecum can be so sweeping in its reach as to constitute an unreasonable search and seizure, thereby violating the Fourth Amendment. *Hale v. Henkel, supra* at 76. Yet, assuming *arguendo,* that the instant subpoena duces tecum is so broad as to infringe on the plaintiff's Fourth Amendment rights, the Court is constrained to conclude that the Government met its burden of proving plaintiff's consent to any search.

As enunciated by the Supreme Court in *Schneckloth, supra,* the voluntariness of a search "is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. Further, knowledge of the right to refuse consent is but one factor to be considered. *Id.*

Upon review, it is clear that in the totality of the circumstances, the continuous presence of plaintiffs' attorneys on the premises of 514 Prospect Avenue, and the active role of legal counsel in advising and influencing plaintiffs' decision to comply, precludes the Court from finding that plaintiffs' compliance with the subpoena was involuntary.

First, the FBI agents in no way restrained Bosse from seeking legal counsel from Jackson immediately upon ser-

vice of the search warrant and subpoena. Second, plaintiffs complied with the subpoena only after conferring with Jackson and upon his advice as to the legal ramifications of the document. *See, United States v. Re,* 313 F. Supp. 442 (S.D. N.Y. 1970). Third, although plaintiffs seek to minimize Kollette's professional experience as well as his presence on the premises throughout the entire day, the fact remains that Kollette is a member of the law firm of Kohrman & Jackson, and he was specifically instructed by Jackson to monitor, collect, inventory and deliver all documents presented, thereby undermining any implication by plaintiffs that Kollette was operating in a merely clerical capacity.

A second significant factor supporting the Court's determination that the compliance was voluntary is the numerous references to the desire, communicated both by plaintiffs and their legal counsel, to cooperate with the Grand Jury. Moreover, the Court cannot ignore the telephone call from Jackson's law clerk received by Douglas Roller, Special Attorney for the United States Department of Justice, also assigned to the Strike Force, subsequent to the delivery of the documents to the Grand Jury, wherein he was told that plaintiffs' legal counsel did not intend to challenge the subpoena. The six-day delay in filing of this Motion is further reflection of the plaintiffs' initial decision to not resist the subpoena. Indeed, had plaintiffs pursued, as they did in related case, the available legal remedies to quash the subpoenas issued herein at any time prior to the use, by the Grand Jury, of the documents produced thereunder, this Court may very well have held as it did in the related case, when the issue was properly joined. *See, United States v. Ryan,* 402 U.S. 530 (1971). However, the query is merely academic at this point in time.

The Court is cognizant that there is a conflict in the testimony with regard to the voluntariness of the compliance. However, after having observed the witnesses' manner of testifying, their candor or lack thereof; their intelligence, interest and bias, together with all other circumstances surrounding their testimony, the Court elects to assign greater credibility and weight to the Government's witnesses than to plaintiffs'.

To that end, the Court concludes that, contrary to Bosse's testimony, the Government neither reviewed documents nor entered into any physical space without the express permission of the plaintiffs. Moreover, the Court finds that not only did the plaintiffs, including Orrico, fail to demand that the FBI agents depart the premises, but to the contrary, the agents' continued presence was, in fact, requested to assist in the gathering of the documents.

Furthermore, assuming that the Court had determined that Orrico had demanded that the agents leave, it is apparent that, in light of the subsequent events, such demand is without legal significance. The evidence presents some confusion in that Bosse, Wachs and Orrico testified that each was the custodian of the records subpoenaed, without further evidence of official capacity or position with the corporations. The Court is faced with the obvious dilemma of two individuals' articulating voluntary compliance and one, if Orrico's testimony is to believed, objecting. Absent definitive testimony as to official capacity, the Court must infer authority to comply, as developed by the testimony and actions of the individual parties. Viewing the testimony in its entirety, it is apparent that from the outset Bosse assumed the dominant role, formulating the decision to seek legal counsel, directing Wachs, Kollette and Jackson in their respective ac-

tions, and counseling, to the point of directing, Orrico to conform to his instructions. The Court is therefore constrained to conclude that Bosse, if anyone, had the authority to order compliance with the subpoenas, which, in this case, constituted a waiver of possible Fourth Amendment infringement. *See, Schwimmer v. United States,* 232 F.2d 855, 860 (8th Cir.), *cert. denied,* 352 U.S. 833 (1956).

In light of the identity of the subpoenas served on Bosse, Wachs and Orrico, and the admission by each of his role as custodian of the records, the decision by any one of the three to voluntarily comply enabled the Government to properly obtain all the records over any objection by either of the other two.

Finally, plaintiffs urge the Court to adopt a *per se* rule that consentual compliance can never exist when production is obtained pursuant to an overly broad forthwith subpoena duces tecum. In support thereof, the Court's attention is directed to *Bumper v. North Carolina,* 391 U.S. 543, 549 (1968), wherein the Supreme Court stated:

> A search warrant conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all. When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. When there is coercion there cannot be consent.

The Court concludes that the extension of the *Bumper* principle to vitiate consent when production of documents is obtained pursuant to an invalid subpoena duces tecum would not be appropriate. First, as heretofore noted, the coercion inherent in a search warrant is far greater than that existent in a subpoena duces tecum. Indeed, that the agents cannot seize documents in the face of a custodian's refusal to comply with a subpoena duces tecum, *Mancusi v. DeForte,* 392 U.S. 364 (1968), serves, in large part to dissipate any aura of coercion therein. Moreover, in the wake of the Supreme Court's refusal to adopt a *per se* rule regarding consentual searches in *Schneckloth, supra,* opting instead to employ a factual analysis of each case, reflects the disfavor in which such *per se* rules are held and clearly militates against the extension plaintiff seeks.

The Court's decision that plaintiffs' Fourth Amendment rights have not been violated is limited to the facts and circumstances of this case, and should not be construed as an indication of what this Court might conclude under similar circumstances but involving unsophisticated individuals acting without advice of legal counsel.

Accordingly, plaintiffs' Motion for Return of Seized Property, pursuant to Rule 41(e), Fed. R. Crim. P., must be and hereby is denied. It appearing to the Court, however, that the great volume of documents subpoenaed from petitioners could understandably impede the operation of their business for a protracted period, the Court hereby ORDERS the Government to return to petitioners the originals of all documents produced pursuant to the instant subpoenas duces tecum by October 18, 1976. This Order does not preclude the Government from copying any or all such records.

IT IS SO ORDERED.

ROBERT KRUPANSKY
United States District Judge.

Order

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C76-998

CONSUMER CREDIT INSURANCE AGENCY, INC., *et al.*,

Plaintiffs,

—v.—

UNITED STATES OF AMERICA,

Defendant.

Filed October 7, 1976.

In accordance with the Order filed herein on Oct. 6, 1976,

IT IS ORDERED that plaintiff's motion for return of seized property is denied.

IT IS FURTHER ORDERED that the Government return to petitioners the originals of all documents produced pursuant to the instant subpoenas duces tecum by October 18, 1976. The Government is not precluded from copying any or all such records.

ROBERT B. KRUPANSKY
United States District Judge